PUBLIC PROSECUTOR

v.

BRIAN GEOFFREY CHAMBERS & ANOR.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CRIMINAL TRIAL NO. 3 OF 1984]
7 OCTOBER 1985

CRIMINAL LAW AND PROCEDURE: *Trafficking of drugs - Sections 39B(1)(a), 39B(2) of Dangerous Drugs Act 1952 (Revised 1980) - Section 34 of the Penal Code - Presumptions under s. 37(d), (da) of Dangerous Drugs Act - Possession - Common intention - Sentence - Dangerous Drugs (Amendment) Act 1983 - Death on conviction.*

EVIDENCE: *Prima facie case - Close of prosecution - Evaluation of witnesses and their evidence - Reasonable doubt - Onus on prosecution.*

LEGAL PROFESSION: *Professional communication - Section 126 Evidence Act - Legal Profession Act 1976 - Etiquette rules.*

Both accused persons who were detained at Bayan Lepas International Airport at Penang were charged for an offence of trafficking in 179.56 grammes of dangerous drugs in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) (hereinafter referred to as "the Act"). This offence was punishable under s. 39B(2) of the Act read together with s. 34 of the Penal Code and carried the penalty of death on conviction. The dangerous drugs were found in one of the suitcases carried by Accused No.2. Accused No.1 was Accused No.2's travelling companion.

Held:

[1] After considering the submission of Counsel, the learned Judge was satisfied from the evidence adduced by the prosecution that a *prima facie* case had been established within the principles of *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11 against both accused persons, which if unrebutted, would warrant a conviction. Defence was then called.

[2] Before considering the case for the defence, the learned Judge made it clear that upon evaluation of the whole evidence of the prosecution, His Lordship accepted the evidence of 3 prosecution witnesses and was satisfied that they were witnesses of truth. After having seen PW2 giving evidence and having observed his demeanour, especially when he was cross-examined, the learned Judge said he had no reason to disbelieve PW2's testimony.

[3] Taking into account the surrounding circumstances and all the relevant facts, on the balance of probability, Accused No.1 must have known about the suitcase which contained the drugs in question.

[4] The presumptions under s. 37(d) and (da) of the Act did apply against Accused No. 1. He was the owner of the suitcase which contained the drugs. Although at the material time he was not in manual possession, he was at the very least in control of it. (See per Lord Diplock in *Director of Public Prosecution v. Brooks* [1974] AC 862 at 886). Upon considering the evidence as a whole, Accused No. 1 had not given any reasonable explanation to rebut the presumptions under s. 37(d) and (da) of the Act. He had also failed to raise any reasonable doubt as to the truth of the prosecution case.

[5] Solicitor for Accused No. 2 wanted a ruling from the Court to prevent solicitor for Accused No. 1 from cross-examining Accused No. 2 on the ground that solicitor for Accused No. 1 would himself be required to give evidence as a defence witness on matters relating to the time when solicitor for Accused No. 1 was the solicitor on the record for Accused No. 2 as well. Solicitor for Accused No. 2 also wanted to cross-examine solicitor for Accused No. 1 as to the professional communication between him and his former client Accused No. 2. The learned Judge ruled that on the evidence before him, the Court could not prevent solicitor for Accused No. 1 from acting for Accused No. 1 in the manner he did. Throughout the cross-examination, solicitor for Accused No. 1 had not breached s. 126 of the Evidence Act. At any rate if at all there was a breach of professional etiquette the matter could have been dealt with easily under the Legal Profession Act 1976 and its etiquette rules.

[6] Although the investigation and the prosecution were not conducted at its very best, fullest consideration had been given to the points raised by defence Counsel on the unsatisfactory nature of the prosecution evidence but His Lordship found that there was no material gap in the prosecution evidence.

[7] Upon considering the evidence as a whole, Accused No. 2 was found to have failed to raise any reasonable doubt and to rebut the presumptions under s. 37(d) and (da) of the Act. On the other hand, the learned Judge was fully satisfied that the prosecution had proved the case against Accused No. 2 beyond reasonable doubt within the meaning of s. 2 of the Act even without the aid of presumptions. However, with the aid of the presumptions the case against him was overwhelming.

[8] When considering the evidence of the accused persons, the learned Judge approached it on a well-settled principle that it was not for them to prove anything but merely to give an explanation consistent with their innocence. The Court must then consider whether such explanation might reasonably be true although not convinced of its truth. It followed that if the Court accepted the explanation, it must acquit. However, the Accused were still entitled to an acquittal if of the explanation raised a reasonable doubt as to their guilt as the onus of proving their guilt was on the prosecution. If upon the whole evidence the Court was left in a real state of doubt, the prosecution had failed to prove a case against the Accused and the Accused were therefore then entitled to an acquittal. *(Mat v. PP* [1963] MLJ 263).

[9] The explanation given by both accused persons did not meet these requirements. On the other hand, upon the evidence tendered as a whole the change was established against them beyond all reasonable doubt.

[10] The learned Judge was also satisfied that from the conduct of the accused persons either individually or jointly and in the circumstances of this case they had acted with common intention under the principle as explained in *Mahbub Shah v. King-Emperor* [1945] LR Vol LXXII 148.

[11] With regard to sentence, the Dangerous Drugs (Amendment) Act 1983 which came into force on 14 April 1983 stated clearly that any person found guilty of trafficking under the charge would be punished on conviction with death. In the course of the trial, the learned Judge did entertain submissions by Counsel on mitigation but in view of the amendment, His Lordship held that he had no alternative but to impose the only sentence known to law, that is, death.

[Both accused convicted and sentenced to death.]

Cases referred to:
Haw Tua Tau v. Public Prosecutor [1981] CLJ (Rep) 11
Director of Public Prosecutor v. Brooks [1974] AC 862
Leow Nghee Lim v. Reg. [1956] MLJ 28
Mat v. PP [1963] MLJ 263

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)
Evidence Act 1950, s. 126

For the public prosecutor - Bazain bin Idris
For the accused No. 1 - R. Rajasingam; M/s. Rajasingam & Co.
For the accused No. 2 - Karpal Singh; M/s. Karpal Singh & Co.

[**Editor's Note:** The Accused appealed against the above decision. The appeal on the above was heard on 16 and 17 December 1985 at the Supreme Court sitting in Kuala Lumpur. The Supreme Court constituted of Y. A. A. Tun Dato Hj. Mohd. Salleh bin Abas, LP, Y. A. Datuk George Edward Seah Kin Seng SCJ, Y. A. Tan Sri Dato' Eusoffe Abdoolcader SCJ. The Supreme Court Appeal Nos. are Criminal Appeal No. 35 of 1985 for Accused No. 2 and Criminal Appeal No. 36 of 1985 for Accused No. 1. The Supreme Court affirmed the judgment of the learned Judge on 18 December 1985.]

JUDGMENT

Mohamed Dzaiddin J:

Both accused persons were charged before this Court for an offence of trafficking in dangerous drugs who would be punishable on conviction with death. The charge read as follows:

> That you on 9 November 1983 at about 4.30 p.m. at Bayan Lepas International Airport, in the District of Balik Pulau, in the State of Penang, in furtherance of the common intention of you all, did on your own behalf traffic in dangerous drugs, to wit 179.56 grammes of heroin, in contravention of s. 39B(1)(a) of the Dangerous Drug Act 1952 (Revised 1980) and that you have thereby committed an offence punishable under s. 39B(2) of the same Act read with s. 34 of the Penal Code.

Briefly, the facts of the prosecution case were as follows. On 9 November 1983 ASP Abu Shariman bin Abu Yazid (PW2), a senior officer of the Anti Narcotic Task Force was on duty at Bayan Lepas International Airport Pulau Pinang. At about 4.30 p. m. he noticed the two accused persons alighting from a taxi in front of the airline checking counters at the main entrance of the airport. He was then standing near the stairs leading to the ground floor of the airport. He observed the two accused walking away in different directions from the taxi. Accused No. 1 proceeded to the DCA baggage security scanner nearby whilst Accused No. 2 went to the Mas first class checking counter via a long route. Accused No. 1 was carrying a dark brown soft layered bag (P3) and a sling bag (P4) whilst Accused No. 2 carried a maroon coloured suitcase (P5) and transistor radio (P6). PW2 then went to the MAS counter and approached Accused No. 1. He identified himself as a police officer and requested Accused No. 1 to produce his passport. Upon checking the passport, he returned it to Accused No. 1 and at that time Accused No. 2 approached the same counter. Likewise, he identified himself and requested Accused No. 2 to produce his passport. At that point of time, PW2 observed that Accused No.2 was shivering and was looking at Accused No.1. He returned the passport and requested both the accused persons to follow him with their luggages to a checking room on the mezzanine floor of the airport.

In the checking room PW2 requested Accused No. 1 to open the bags which he was carrying. However, the bags P3 and P4 were opened by Accused No.2. On examination PW2 found nothing incriminating in them. Then, he asked Accused No. 2 to open his bag, P5. He could not do so. Instead, Accused No. 1 opened it. On examination, PW2 found a blue soft layered bag (P7) in P5. When he opened P7 he recovered three packages, two of them were wrapped in Chinese newspapers and the other in a light pink plastic bag. He examined these three packages and found 17 packets (P9A-9Q) in the first package; 13 packets (P11A-11M) in the second package and 11 packets and (P13A-13K)in the third package. All these packets were believed to contain heroin. They were then marked for identification with his initials on the packets and newspaper wrappings. Throughout the search in the checking room, four other police officers, namely DPC Abu Hassan bin Yahya, DPC Ismail bin Ahmad, DPC Shamsuddin bin Othman and DPC Mohd. Rashid bin Maula Bakhas were present. Incidentally, they were offered to the defence at the close of the prosecution case. Immediately thereafter, PW2 placed both Accused under arrest. They were then taken to the airport police station on the lower ground floor of the airport. A body search on the Accused was carried out. PW2 did not recover anything incriminating on their persons. He prepared a search list (P15) and served on both Accused, who acknowledged receipt. They were taken to the Police Headquarters Penang on the same evening at about 6.30 p.m. PW2 handed both Accused and the exhibits to the Investigating Officer, Insp. Charles Labung Lawai (PW5) at about 11.15 p.m.

On 11 November 1983 at about 3.00 p.m. PW5 brought both Accused to his office where they were asked to sort out and identify their belongings from the suit-cases. He saw Accused No. 2 removing some items from P5 and Accused No.1 from P3. Then, on 12 November 1983, PW5 sent the Exhibits P9A to P9Q, P11A to P11M and P13A to P13K to the Government Chemist. These exhibits were packed in three packages marked as E1, E2 and E3 and sealed with "Polis Di Raja Malaysia 336".

Mr. Ng Hock Seng (PW1), a Government Chemist attached to the Chemistry Department Pulau Pinang in his evidence confirmed having received these three packages on 12 November 1983. He examined the content of these packages. In package E1, he found 17 plastic packets (P9A to P9Q) which contained a total of 184.89 grammes of a pink substance. On analysis the substance contained 68.24 grammes of heroin. In E2, he found 13 plastic packets (P11A to 11M) weighing a total of 136.26 grammes of light pink substance which on analysis contained 58.54 grammes of heroin. Finally, in E3 there were 11 packets (P13A to 13K) weighing 136.95 grammes of a similar pink substance which on analysis contained 52.78 grammes of heroin. Here, I accepted the entire evidence of PW1. On 26 November 1983 he returned E1, E2 and E3 to PW5.

After considering the submission of Counsel I was satisfied from the evidence adduced by the prosecution that a *prima facie* case had been established within the principles of *Haw Tua Tau v. Public Prosecutor* [1981] CLJ (Rep) 11 against both accused persons, if unrebutted, would warrant a conviction. Accordingly, I called for the defence.

Before considering the case for the defence, it is important that I make it clear that upon evaluation of the whole evidence of the prosecution, (the greater part of the evidence against the two accused persons, undoubtedly, being centered on ASP Abu Shariman, PW2), I accepted the evidence of PW1, PW2 and PW5, I was satisfied on the whole that they were witnesses of truth. In the case of PW2, his presence and alertness at the material time led to the arrest of the accused. After having seen him giving evidence and having observed his demeanour, especially when he was cross-examined, I had no reason to disbelieve his testimony. Attempts were made during the defence case by Counsel for the Accused No. 2,

to recall him for cross-examination and to adduce evidence with the view to discredit him. However, I disallowed Counsel's application as I found there was no justification for Counsel to pursue this line of questioning other than to embarrass him. To say that because he was found guilty under a private summons, his testimony in the present case must be viewed with suspicion or in law must be rejected or disbelieved, was untenable. I should reiterate here that I had no reason to disbelieve his evidence which he had given in this Court.

Defence

After the three alternatives having been explained, both accused persons elected to give evidence on oath. By way of introduction, Accused No. 1 stated he was a building contractor from Fremantle, Western Australia. On 20 October 1983 he flew into Singapore en route to Kuala Lumpur. While on transit at Changi Airport, expecting to take a shuttle flight to Kuala Lumpur, he met Accused No. 2 by chance at the coffee lounge. Both of them did not know each other but after some conversation Accused No. 1 realised that they both had met before at a construction site in Perth. Accused No. 2 was booked on the same flight to Kuala Lumpur. However when they went to check in they found they were late for the flight. So they decided to spend the night together in Singapore in a hotel and shared a room and expenses. They flew to Kuala Lumpur the next morning. In Kuala Lumpur, they also stayed together at Hotel Fortuna for a week and shared a room and expenses. On arrival in Kuala Lumpur Accused No. 2 suffered conjunctivitis. He also contracted it a day after. Accused No. 1 stated that he had with him for the trip a sling bag (P4) and an old Australian type suitcase. Because of the disease, both Accused decided to keep their contaminated clothings together in one suitcase.

On 4 November 1983 they travelled to Penang by train and stayed at Town House Hotel, Penang Road. They checked in one room and shared expenses. Whilst in Penang they did a bit of sight-seeing together but at other times they went on separate ways.

On 9 November 1983 he decided to follow Accused No. 2 back to Kuala Lumpur. At about 11.00 a.m. he left for breakfast in town and returned to the hotel at about 12.00 noon to meet Accused No. 2. They went out together for lunch and did some shopping. While he was having lunch, Accused No. 2 went to MAS office at Komtar to purchase tickets for Kuala Lumpur. After lunch, he went to a shop to buy to suitcase (P5). He checked P5 before leaving the shop and discovered that there was a key and an instruction booklet inside the suitcase. However he did not ask the shopkeeper to demonstrate how to operate the lock, nor did he himself meddle with it. He brought the suitcase back to the hotel. He met Accused No. 2 in the hotel room. He removed his belongings from the old suitcase and put them inside P5. He also sorted out his contaminated clothings from the old suitcase. He left P5 opened when he went to have a shower. Accused No. 2 told him that he wanted to put his contaminated clothings in P5 which he did not object. After shower he found that Accused No. 2 had closed the suitcase P5 and packed other bags. Accused No. 2 settled the hotel bills.

They left for the airport in a taxi. On arrival at the airport, the taxi driver took out the luggages and placed them on the pavement. Accused No. 1 stated that Accused No. 2 picked up P5 and P6 and said he would meet him in the lounge. After paying the taxi fare, he carried P3 and P4 to the security baggage scanner and proceeded to check in at the MAS counter. PW2 approached him. He identified himself as a police officer and requested for his passport. According to Accused No. 1 PW2 retrieved P3 which was on the weighing scale and asked him to wait. In the meantime, PW2 approached Accused No. 2. Both of them followed PW2 to a room. He carried P3 and P4 and Accused No. 2 carried P5 and P6. In the checking room, PW2 asked both of them to open their respective bags. He opened his bag P5 which was

carried by Accused No. 2. He confirmed that PW2 recovered from P7 three packages P9, P11 and P13. Accused No. 1 told PW2 that he knew nothing about P7 and its content. They were then arrested and taken to the airport police station. On the same evening they were taken to the Police Headquarters Penang.

Under cross-examination by Mr. Karpal Singh, Accused No. 1 stated that he had been to Malaysia several times in the past on business and at times on holidays. He said he met Accused No. 2 at Changi Airport purely by chance. He denied having P7 with him while in Singapore. The only occasion he saw P7 was at the Bayan Lepas Airport. As for the old suitcase, he stated that he left it in the hotel room in Penang and did not disclose to anyone about the disposal. He disagreed that both of them kept their clothes separately in their own suitcases. Under further cross-examination, he stated it was a fact that Accused No. 2 placed P7 with the drugs P9, P11 and P12 in his suitcase P5.

When cross-examined by the learned DPP, Accused No. 1 stated he did not consult a doctor for his conjunctivitis because he felt it was not necessary. However, he shared Accused No. 2's medicine. Both of them made the decision to come to Penang while in Kuala Lumpur. In answer to another question by the learned DPP regarding P5, he said that he allowed Accused No. 2 to carry P5 because Accused No. 2 had some of his belongings in P5.

In evaluating the evidence of Accused No. 1 my impression of him was that of a person of average intelligence. He did not mince his words but appeared to be brief in giving his evidence. It was clear to me that his defence was a complete denial of any knowledge of the drugs found in his own suitcase, P5, which Accused No. 2 carried at the time of their arrest. The accusing finger was pointed solely at Accused No. 2. In fact from his evidence he wanted the Court to believe that Accused No. 2 was the villain, that there was every opportunity for Accused No. 2 to place the drugs in P5 while he was having his bath, and that he had no knowledge of the drugs inside P5 until at the checking room at the airport.

From the evidence, it was my finding of fact that P5 belonged to him and that at the time of his arrest it was carried by Accused No. 2. Any suggestion that Accused No. 2 had placed the drugs in P5 without his knowledge was not only untrue, but also unreasonable or improbable. Clearly, he must have known about it or else how could he say, when under cross-examination by Mr. Karpal Singh, that it was a fact that Accused No. 2 had put the blue bag P7 with the drugs P9, P11 and P13 in his suitcase P5 (see p. 41 lines C4 & C5 of the Notes of Evidence). Moreover, from the surrounding circumstances of the whole case, I found it was not reasonable for him to say that he had no knowledge of P7 and the drugs in P5. Their meeting in Singapore, which he claimed to be a chance meeting, and subsequent relationship throughout the journey was too naive to be considered as a sheer coincidence. Nor could I accept that they were here on a pleasure trip. They had been together from Singapore until the fateful day sharing their thoughts, hotel rooms, expenses, and suitcases and even contracted conjunctivitis as a result of being together. Accused No. 2 could not be a total stranger to him. In fact there was no occasion for him to be suspicious of Accused No. 2.

Mr. Rajasingam submitted that the acid test was the question of credibility of Accused No. 1. Based on the evidence of the prosecution and under cross-examination, the explanation of Accused No. 1 was more credible and probable and urged the Court to accept his explanation. He also submitted that the presumptions under s. 37(d) and (da) of the Act did not apply to Accused No. 1 because Accused No. 2 was in custody and control of P7 in P5 and had knowledge of the drugs.

I found it material to consider the blue-coloured soft layered bag, P7, Accused No. I denied any knowledge of it. He stated that from Singapore he had only P4 and an old Australian-type suitcase. The first time he saw P7 was at the checking room at the airport. Accused No. 2, in his evidence, said Accused No.1 had P7 with him all the time from Singapore. As for the old suitcase, he stated that he brought it to Penang but when he purchased P5 he left it in the hotel room. He did not disclose it to anyone about this old suitcase. It was improbable that Accused No. 1 could have disposed this old suitcase without even disclosing it to his companion, Accused No. 2. There was nothing for him to hide, after all, it was only an old suitcase. Did this old suitcase ever exist? He did not mention anything about it in his cautioned statement (D37). Accused No. 2 said there was no such suitcase. In the circumstances, the irresistible inference was that this suitcase had never existed.

Having rejected his explanation about the existence of the old suitcase, it was improbable for him not to have known about P7, even if he denied that it was his, when he was packing P5 in the hotel room. He stated that he had sorted out his belongings and put them in P5. He left P5 opened when he went to have his bath. While having his shower, Accused No. 2 put his contaminated clothings in P5. It appeared that it was Accused No. 2 who closed P5. This was denied by Accused No. 2. However, from the surrounding circumstances it could be inferred that whoever put P7 in P5, it must have been done with the knowledge of Accused No. 1. Therefore, on the balance of probability, Accused No. 1 must have known about P7 which contained the drugs in question.

I was satisfied that the presumptions applied against him. He was the owner of P5 which contained P7 and the drugs. Although at the material time he was not in manual possession, he was at the very least in control of it. "In the ordinary use of the word "possession", one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control." per Lord Diplock in *Director of Public Prosecutor v. Brooks* [1974] AC 862 at p. 886. (See also the observations of Taylor J as to the meaning of "possession" in *Leow Nghee Lim v. Reg* [1956] MLJ 28).

Therefore, upon considering the evidence as a whole, I was satisfied that Accused No. 1 had not given any reasonable explanation to rebut the presumptions under s. 37(d) and (da) of the Act. He had also failed to raise any reasonable doubt as to the truth of the prosecution case. Accordingly, I found him guilty as charged and convicted him.

In the case of Accused No. 2, his defence was as follows. He claimed he had met Accused No. 1 only once in Australia, but could not remember which part of Australia. However, on 28 October 1983 he met Accused No. 1 at Singapore Airport. He stated that the occasion was when he was going through some hotel brochures in the coffee lounge when both of them struck up a conversation. Pausing here for a moment, it must be remembered that he stated in his cautioned statement (D38) that he knew Accused No. 1 only for about two weeks when he first met him in Singapore. Later they stayed together in Singapore sharing their thoughts. While in Singapore he contracted conjunctivitis. From Singapore both of them of them came to Kuala Lumpur and stayed together. Then on 4 Novomber 1983 they came to Penang and stayed at Town House Hotel, Penang Road.

Accused No. 2 further stated that throughout his journey from Singapore to Penang he carried P3. He remembered that Accused No. 1 carried P4 and a blue bag P7. Because of conjunctivitis both of them kept their clothings in their own bags.

On 9 November 1983 Accused No. 2 went to MAS office at about 1.00 p.m. to collect the tickets for Kuala Lumpur. He stated that both of them arranged to meet at the coffee shop near Komtar building after he picked up the tickets. They met at the said coffee shop and he saw Accused No. 1 carrying the suitcase P5. They returned to the hotel at about 2.00 p.m. When they entered their room Accused No. 1 had a shower first before him. He did not put anything in P5 at the time when Accused No. 1 was having his shower although he did the bulk of his own packing. After his shower, he completed his packing by putting his towel inside his bag P3. Both of them left for the airport at about 4.00 p.m. On arrival at the airport Accused No. 1 told him that he would pay the taxi fare. When they came out from the taxi, he was handed by the taxi driver the suitcase P5 and proceeded to the MAS counter carrying both P5 and P6. When he arrived at the MAS 1st class counter he met PW2 who identified himself and asked for his passport. At the search room PW2 asked him to identify his bag. He identified P3 and was asked to open it. He was not sure whether he opened P3. However when PW2 asked him to open P5, he told him that he could not do so as P5 belonged to Accused No. 1. He denied having anything to do with the drugs found in P7 which was recovered from P5. He said he had no knowledge whatsoever of them.

During the course of his evidence-in-chief several questions were asked arising from the evidence given by the prosecution witnesses as well as Accused No. 1. Accused No. 2 denied that both of them kept the contaminated clothings in one bag. He did not see Accused No. 1 having an old suitcase from the time he first met him in Singapore. He also denied that he ever said anything to Accused No. 1 about putting his contaminated clothes in P5 at the time when Accused No. 1 was having his shower. He never took out any contaminated clothings from P5.

When asked by his Counsel why he took a longer route from the taxi to the MAS counter, he replied stating that being the first time to Penang he did not know the way to the MAS counter. He saw a group of people checking in but was told that it was the economy class counter. He then went across to the 1st class counter. When asked why he shivered after PW2 had identified himself to him, his reply was that he could not remember if he was shivering at that particular time. He admitted that he was shaking which happened to him all the time due to his groin injury. He was suffering from pelvic ailment.

Before Mr. Rajasingam began to cross-examine Accused No.2, Mr. Karpal Singh invited me to make a ruling to prevent Mr. Rajasingam from cross-examining Accused No. 2 because he would be required to give evidence as a defence witness to produce two letters which he had written on behalf of Accused No. 2 when he was the solicitor on record at the time when the two letters were written. Mr. Karpal Singh also wanted to cross-examine him as to the professional communication between him and his former client Accused No. 2. I did in the course of the trial give my ruling and held that on the evidence before me, the Court could not prevent Mr. Rajasingam from acting for Accused No. 1 in the manner he did. Throughout the cross-examination I found that Mr. Rajasingam had not breached s. 126 of the Evidence Act. At any rate if at all there was a breach of professional etiquette the matter could have been dealt with easily under the Legal Profession Act 1976 and its etiquette rules.

Under cross-examination, he stated that his trip to Singapore was a pleasure trip. He disagreed that Accused No.1 had an old suitcase. He also said he could not remember whether he was shivering at the airport and stated that if what PW2 had said was correct, then he was suffering from fits of spasm due to his injury. He admitted having checked in P5. It was suggested that he was prepared to open any other bag except P5 because he knew that it contained drugs. However he denied this. According to him the evidence of PW2 was a

complete fabrication. He said that although he had not met or known PW2 prior to 9 November 1983, he felt there was antagonism in the sense that PW2 had insisted him to show from P5 where the drugs were hidden. This answer was elicited as a result of the evidence of PW2 who, when recalled by Mr. Karpal Singh and cross-examined by Mr. Rajasingam stated that Accused No. 2 offered him a bribe if he could have this matter settled. Accused No. 2 refuted this allegation and denied having attempted to bribe PW2. He also denied suggestions by the learned DPP that he panicked when PW2 recovered the drugs from P5 and that he tried to bribe him because of his knowledge of the drugs in P5.

Mr. Karpal Singh on behalf of Accused No. 2 submitted on what he called the unsatisfactory nature of the prosecution evidence. He referred to some of the evidence of PW2 especially the evidence regarding the offer of bribe purportedly to have been made by Accused No. 2 to PW2. This evidence came about after PW2 was recalled for further cross-examination. Counsel said that his evidence was never given during PW2's evidence-in-chief. Being a serious offence (for attempting to bribe a police officer) PW2 should have reported or lodged a police report to that effect. He had failed to do so. In the light of his client's explanation he urged the Court to reject this evidence. Another aspect of the unsatisfactory nature of the prosecution evidence related to the mistake made by PW2 when he stated in his examination-in-chief that he also recovered from P5 a brown briefcase (ID8). Here, I accepted his explanation of a genuine mistake. Counsel also touched on the lack of evidence to discover any finger print P7, P9, P11, P13 and that the search list (P15) was not itemised.

Whilst I agree the investigation and the prosecution were not conducted at its very best, I must stress that I had given my fullest consideration to the points raised by Counsel but found there was no material gap in the prosecution evidence. Needless to say, as for PW2, I accepted his evidence and found him to be a truthful witness.

Secondly, Counsel submitted that on the evidence of PW2 and Accused No. 2, the latter had rebutted the presumption under s. 37(d) and (da) of the Act. He said that the old bag never existed. Otherwise Accused No. 1 would have mentioned it in his cautioned statement (D37). What existed was P7, According to PW2 there was a combination set of P5. There was this irresistible inference that Accused No. 1 had knowledge of the combination numbers of P5 and opened it and therefore had knowledge of its content. Counsel further submitted that taking the evidence as a whole, there was also this irresistible inference that it was Accused No. 1 who put P7 which contained the drugs in P5. On this issue, I accepted that the old suitcase never existed. With regard to P7, the blame was now pushed to Accused No. 1. Be that as it may, it could also be inferred from the circumstances of the whole case that Accused No. 2 knew about P7 and its contents. The packing of P5 was done in the hotel room shared by both accused persons. Their relationship with one another had been established in the sense that they were more than being companions. From the evidence I was satisfied that P5 belonged to Accused No. 1. I was equally satisfied that Accused No. 2 was in possession of P5 which contained P7 at the time of his arrest. His evidence was a bare denial of any knowledge of the drugs found in P5.

On the question of shivering, Counsel submitted that it was quite natural for Accused No. 2 to be scared of police officers. He urged the Court to accept the explanation of Accused No. 2 that the shivering was due to his pelvic injury. With respect, I could not agree with this submission. I found that his conduct at the airport from the time he alighted from the taxi until the time he was in the checking room was not only suspicious but had served to strengthen the case against him.

Upon considering the evidence as a whole I was satisfied that Accused No.2 had failed to raise any reasonable doubt and to rebut the presumptions under s. 37(d) and (da) of the Act. On the other hand I was fully satisfied that the prosecution had proved the case against Accused No. 2 beyond reasonable doubt within the meaning of s. 2 of the Act even without the aid of the presumptions. However, with the aid of the presumptions, the case against him was overwhelming. Accordingly I found him guilty and convicted him.

When considering the evidence of the accused persons I approached it on a well-settled principle that it was not for them to prove anything but merely to give an explanation consistent with their innocence. I reminded myself that the Court must then consider whether such explanation might reasonably be true although not convicted of its truth. It followed that if the Court accepted the explanation, it must acquit. However, the Accused were still entitled to an acquittal if the explanation raised a reasonable doubt as to their guilt as the onus of proving their guilt was on the prosecution. If upon the whole evidence the Court was left in a real state of doubt, the prosecution had failed to prove the case against the Accused. They were, therefore, entitled to an acquittal (see *Mat v. PP* [1963] MLJ 263).

In coming to my decision in this case it was my finding that the explanation given by both accused persons did not meet these requirements. On the other hand, I was fully satisfied that upon the evidence tendered as a whole the charge was established against them beyond all reasonable doubt.

Lastly, I was satisfied that from the conduct of both accused persons which I had earlier adverted to either individually or jointly and in the circumstances of this case they had acted with common intention under the principle as explained in *Mahbub Shah v. King-Emperor* [1945] LR Vol. LXXII 148. I rejected the evidence that they met in Singapore by chance and subsequently became friends as unreasonable. They were more than what they claimed to be. Accused No. 1 had visited Malaysia several times in the past. They must have come to this country with a prearranged plan other than a pleasure trip. From the circumstances of the case the inference was that they came to Penang to purchase drugs. Lord Thankerton in delivering the judgment of the Privy Council said at p. 153 as follows:

> To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a prearranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As had been often observed, it is difficult, if not impossible, to procure direct evidence to provide the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

With regard to sentence, the Dangerous Drugs (Amendment) Act 1983 which came into force on 14 April 1983 stated clearly that any person found guilty of trafficking under the charge would be punished on conviction with death. I did in the course of the trial entertain submissions by Counsel on mitigation. However in view of the amendment, I had no alternative but to impose the only sentence known to law i.e., death.

Also found at [1986] 1 CLJ 441